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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (J.S. 1a-7a) is reported at 242 F.Supp. 414. The report of the Interstate Commerce Commission appears at 322 I.C.C. 743.[1]

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[1] The Commission's report is also reproduced as Appendix C to the Jurisdictional Statement filed in the appeal of the Chicago and North Western Railway Company and others.

JURISDICTION

The judgment of the three-judge district court was entered on May 24, 1965 (J.S. 8a). The notice of appeal was filed on July 23, 1965. By orders of September 17, 1965, and November 12, 1965, the district court extended the time to docket this appeal and file the record to November 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

QUESTION PRESENTED

Five complaint proceedings were initiated before the Commission by major grain exchanges, millers, and shippers, having interest in grain shipped through the primary grain markets on the Mississippi and Missouri Rivers, against all the major railroads carrying grain to these points. Each complaint asked the Commission to order the railroads to readjust rate relationships and the availability of transit without reference to the "absolute rate break rule," which, as prescribed by the Commission in the 1930's and sustained by this Court in *Board of Trade* v. *United States*, 314 U.S. 534, operated to establish the minimum rates out of these major river points when interior points were not under the same restriction. All railroads named in the complaints opposed mandatory relief; but one railroad (Chicago and North Western Ry. Co.) requested vacation of the order that had promulgated the rule so as to grant the carriers an option to file rates which departed from the rule. After nearly five years of hearings, briefing, argument and reargument, the Commission en-

tered its report approving the course suggested by the North Western, and entered an order vacating the rule as an absolute requirement, but approving no immediate changes in existing rates. The question presented is whether the Commission in this consolidated rate proceeding was required to enter preliminary opinions or orders forewarning the railroads of the relief it contemplated granting the complainants, in the absence of which its choice of remedies would be limited to those specifically requested in the complaints, where the relief granted was within the scope of the issues presented for decision and well within the area covered by the complaints.

STATUTES INVOLVED

Sections 15(1), 15(2), and 16(6) of the Interstate Commerce Act, 49 U.S.C. 15(1), 15(2), 16(6), and Sections 4(a) and 10(e) of the Administrative Procedure Act, 60 Stat. 238, 243, 5 U.S.C. 1003(a), 1009(e), are set forth for the convenience of the Court in the Appendix hereto, J.S. 9a-12a.

STATEMENT

Shippers of well over 100 millions of bushels of grain (principally wheat in this proceeding) and its products in Western States avail themselves of the privilege of stopping a shipment in transit at the great grain centers on the Mississippi and Missouri Rivers for some purpose incidental to manufacture or trade, such as storage or milling. Under this transit privilege, the grain shipments thereafter proceed on to destination in the East and South on the basis of

the rate established between these primary markets [3] and the destination points. See *Board of Trade* v. *United States*, 314 U.S. 534, 535 *et seq.*

The "rate-break" rule which this Court sustained in *Board of Trade* in effect establishes by rule the minimum rates out of these primary markets on all transited grain.[3] In the 1930's prior to such rule, two systems of rates applied through the primary markets, and the outbound rate depended on the type of inbound billing that the shipper could present on the particular quantity of fungible grain it sought to ship from the primary market point. If grain arrived at the primary market on an overhead through rate, the cost of completing the journey (the "transit balance")[4] might be less than if it arrived under local or proportional rates and completed the journey un-

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[2] The primary or rate-break markets include Atchison, Kansas City, and Leavenworth, Kansas; Sioux City, Iowa; Kansas City and St. Joseph, Missouri; Omaha, Nebraska; and Duluth and Minneapolis, Minnesota. Representative interior markets include Hastings, Fremont, Lincoln, and Nebraska City, Nebraska; Hutchinson, Salina, Topeka, and Wichita, Kansas; Cedar Rapids, Des Moines, and Mason City, Iowa; Sioux Falls, S.D.; and Mankato and Winona, Minnesota. (322 I.C.C. at 744, 747 note 12, 755 note 17).

[3] The rule obtains its name from the fact that it requires one rate be charged on traffic to the market point and a separate outbound rate to another market or destination for a literal "break" in the total rate from origin to destination. See *St. L. S.W. Ry. Co.* v. *United States*, 245 U.S. 136, 139-40 n. 2.

[4] Since the transit balance is computed as the difference between the overhead through rate and the rate from origin to transit point, the transit balances will also vary with the flat rates from origin to transit point. See 322 I.C.C. at 747.

der another proportional rate; for the billing relating to the grain moving on the overhead rates could be used to ship out grain arriving under the latter system of rates and thereby defeat the latter rates. These two rates schemes gave rise in the Commission's view, as this Court noted, to "serious discriminations" in favor of the primary markets with their greater storage capacity and wider selection of inbound billing than interior points (314 U.S. at 539). The Commission, therefore, imposed a "rate-break" requirement, under which minimum rates were established by rule on the outbound shipments from the primary markets. The rule did not apply to the interior markets, which retained varying transit balances.

During the 12-year course of the proceedings which led to the *Board of Trade* case, the primary markets complained against this different treatment and sought an order requiring the railroads to stop relying upon the rate-break rule. The Commission at that time concluded, however, as this Court stated, "that the record did not justify the mandatory order sought by the markets. Instead, it authorized the carriers by appropriate tariffs to make 'restricted departures from the exclusive application of proportional rates at rate-break points for a limited period of time.'" (314 U.S. at 545). When the carriers "declined to act on this authorization, the markets again sought a compulsory order." But, the Commission decided to give the absolute rate break requirement a test over "an adequate period of normal con-

ditions in the grain trade," and accordingly dismissed the complaints and withdrew its previous permission to the carriers voluntarily to establish the rates requested by the primary markets. (*ibid.*). This Court sustained the experiment.

From August 10, 1959, to the summer of 1960, numerous grain exchanges, boards of trade, and milling interests in the Midwest [5] involving the same primary markets, filed complaints with the Commission again seeking mandatory relief from the rate-break rule, that is an equality of rates with interior points or more extensive transit privileges. They urged that conditions had changed since the original promulgation of the rule, and argued both, 1) that the rates out of these individual primary markets were unjust and unreasonable, and unduly preferential and prejudicial, and 2) that the absolute rate break rule was an unjust and unreasonable regulation.[6]

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[5] These complainants included the Omaha Grain Exchange, Minneapolis Grain Exchange, The Pillsbury Company, Archer-Daniels-Midland Company, Atchison Board of Trade, The St. Joseph Grain Exchange, Board of Trade of Kansas City, Mo., Bay State Milling Company, and Wolcott & Lincoln, Inc. (322 I.C.C. at 776-77).

[6] For example the complaint of the Atchison Milling Company in Docket No. 33426 alleged that "complainant has been subjected to the restrictions" of the absolute rate-break rule "since the Commission's decision in I.C.C. Docket 17000 (205 I.C.C. 301), except for a brief period between August 23, 1937, and March 31, 1939 . . .". (para. VII); that conditions have now changed since the "prescription of the so-called 'Rate Break' Rule (I.C.C. 17000) . . ." (para. XIII); and prayed the Commission order the appellee railroads to "maintain and apply to the transportation herein described in lieu

In its detailed report of June 5, 1964, the Commission reviewed the exceptions which had been created over the past 30 years to the mandatory application of the rate-break rule. It noted that the rule had never applied on export traffic, which amounts to nearly one half billion bushels per year (322 I.C.C. at 753); and that in 1956 the rule was vacated with respect to all coarse grains (such as corn) (at 754). Nevertheless, the Commission could not on the present record grant mandatory relief from the operation of the rule.

The Commission found that, "the present-day differences in conditions asserted by complainants are not so substantial as to warrant a finding different from that in *Board of Trade*" (at 771). The relief requested by the complainants would permit shippers to defeat the presently established rates out of the primary markets by merely substituting billing on identical quantities of fungible grain. (at 762-64). The Commission found no change in marketing conditions of flour since 1935 which placed Minneapolis at a rate disadvantage (at 767-68); nor any "persuasive evidence on this record that the other primary markets have suffered material injury as a result of the rate-break combinations on wheat and products thereof." (at 769). The report then essentially re-

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of the rates, charges, and regulations hereinbefore referred to such other rates, charges and regulations as the Commission may deem reasonable and just and free from undue prejudice * * *."

peated the findings which originally led the Commission to prohibit a dual system of rates at the primary markets and which were sustained in *Board of Trade*:

> Experience has shown that the existence of such an extensive dual system of rates from the primary markets might result in the destruction of the grain rate structure; injury to the grain market process; competitive injury to shippers at the interior markets; and revenue losses to the rail carriers. (at 770).

The Commission, however, did not see that its work was at an end in denying the mandatory relief asked in the complaints. It expressed the belief that prior decisions of this Court required it to exercise its discretion and to consider alternative forms of relief, including relief "less than that sought in the complaints"; it, therefore, considered "the possibility of merely vacating the mandatory aspect of the rate-break rule, an alternative sought by the C.&N.W. [Chicago & North Western Ry. Co.]" (at 773).

The Commission noted that the rule has certain "indirect adverse effects on the public," since its absolute mandatory form "results in a rather static situation within the western district although there has been a continuous development of advancements . . . and resulting rate reductions, in connection with the movement of grain in other areas." *(ibid.)* The rule precludes the establishment of rates without the expensive feature of transit; and may have a restrain-

ing effect on the railroads' ability to meet unregulated competition. In the Commission's view the rule has resulted in "an inertia resisting change." (at 774).

The Commission concluded that vacation of the mandatory order, as suggested by the North Western during the course of the proceeding, would be beneficial. Such relief would not authorize any immediate change in rates, which would remain subject to the suspension powers of the Commission, but would simply provide the carriers with "an opportunity for competitive initiative." (at 775). Citing Section 16 (6) of the Act, the Commission entered an order under the docket numbers of the complaints and under the number of the old case (Docket 17000, Part VII) vacating and setting aside the rule to the extent it required "observance of rate-break combinations and of proportional rates therein prescribed as the exclusive basis of charges on shipments of grain and grain products at points from which proportional rates are applicable." One of the eleven Commissioners dissented; two others did not participate.

The district court reversed the Commission, not on any grounds relating to the merits of the order, but on grounds that the appellees, each of which participated in the Commission proceeding, had not received "clear, decisive notice of the Commission's contemplated enlargement of the issues in the proceeding and of the proposed amendatory action in Docket 17000, Part VII." (J.S. 6a). It rested its decision entirely on the alleged failure of the Commission to give "any notice that it contemplated reopening Docket

17000, Part VII" nor notice of the "proposed modification" of this old order to make observance of the 'rate-break' rule voluntary or permissive instead of mandatory throughout the entire Western district." (J.S. 4a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The judgment of the district court would narrow the choice of relief which the Commission may consider in lengthy cases involving intricate grain adjustments and conflicting interests in a vast geographical area to the specific relief requested in complaints of the market interests and served on defending railroads. The Commission's choice is narrowed, unless it serves predecisional notice of the relief it contemplates, regardless of the position of the railroads in the matter, or, what is perhaps more significant, regardless of the public interest in the Commission's fashioning a lesser form of relief based on the record before it.

1. The judgment of the lower court is contrary to the ruling of this Court in *Board of Trade* v. *United States*, *supra*, where this Court stated that even though the complaints, as here, sought mandatory relief, "the Commission had several choices before it." The Commission was not sitting to adjudicate private claims against the railroads but to investigate the grain rate structure. "Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wis-

dom of the expert body." (314 U.S. at 547). As this Court stated in *Board of Trade*, the Commission "might have abolished the privilege of free transit entirely" (at 547); so little was the Commission's discretion to grant appropriate relief dependent upon the requested relief of the markets that it might have reached a solution exactly the opposite of that requested by the markets, and not merely lesser relief of the same order, as the Commission now has afforded those markets.

Indeed, the present course adopted by the Commission after nearly five years of litigation is not unique or novel, but was entered in the past and approved by this Court in *Board of Trade*. During the long course of that proceeding before it reached this Court, the Commission had also concluded it could not on the record before it grant mandatory relief, but would allow the carriers to propose departures from the rule for a limited period of time. See page 5, *supra*. The railroads are likewise permitted to depart from the rule by the present order, but with the added safeguard that the Commission will review each proposal and use its suspension powers where individual proposals fail to meet the requirements of lawfulness under the Act. (322 I.C.C. at 775).

2. The Court below reversed the Commission for doing precisely what the Supreme Court recently ordered the Commission to do in *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, and in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, both cited by the Commission (at 773). In each of those cases, this Court ordered the Commission to

exercise a judgment in "choosing a proper remedy," for the "agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case . . .". (371 U.S. at 130). This choice of remedy, however, "may not be automatic; it must be rational and based upon conscious choice" exercised in the circumstances of the particular case (371 U.S. at 167).

This Court stated in *Gilbertville* that a prerequisite to review is that "the parties were heard on the issue." (at 130); the referenced issue was the broad *choice* of remedy and not, as found below, the terms of the specific relief contemplated by the Commission in a predecisional notice, or in the absence thereof the specific relief asked in the complaints. The court below overreached the province of judicial review, which "extends no further than to ascertain whether the Commisson made an allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612.

3. The decision below conflicts with this Court's opinion in *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572, where the Board also failed to give predecisional notice of the relief it contemplated, but was sustained in granting relief even beyond the application before it.[7] It was held sufficient that the relief granted was in the "general area covered by the consolidated hearings" (at 577); for it would "exalt

[7] On the other hand, the present complaints also contained a "catchall clause" requesting other appropriate relief comparable to the one in *State Airlines*. Compare note 6, *supra*, with 338 U.S. at 577.

imaginary procedural rights above the public interest to hold that the Board is hamstrung by the lack of foresight or skill of a draftsman in describing routes" prior to final decision. (at 578).

The appellee railroads argued below, that if they had known during the course of the hearings that the Commission contemplated vacation of the rate-break rule, they would have offered evidence to refute it; and the court below similarly held that appellees "cannot be expected to grope through the litigation" (J.S. 6a). The fact is that the Chicago & North Western Railway consistently urged before the Commission the very relief that the Commission adopted. Its witness stated in his direct testimony: [8]

> It is the position of this carrier that if the Commission considers any departure from the absolute rate break rule then it must also, for orderly and equitable marketing of grain, require the vacation of the outstanding orders in connection with Docket 17000 Part 7 as to all grains not otherwise previously vacated under supplemental orders of the Commission, and that carriers be authorized to exercise their managerial discretion in the making of rates on wheat, wheat products and other grains and their products, subject only to the retention of the maximum reasonable provisions of Docket 17000 Part 7.
>
> * * * *

[8] Exhibit No. 119, pp. 5, 10. In a brief to the Commission filed August 31, 1961, the North Western reiterated, "we seek the alternative of a complete vacation of a rate-break construction permitting the exercise of managerial discretion in rail rate making." (p. 3).

> Under these circumstances, then, either the complaints should be dismissed or the order of the Commission in the Grain Case as amended, should be vacated in a manner similar to the action of the Commission concerning the coarse grain adjustment.

In *State Airlines* the complaining carriers were given only a limited rehearing to offer new evidence. Here appellees had actual notice from the date of the original hearing that vacation of the rule was a form of remedy sought in the proceeding; and yet they proffered no evidence to rebut the North Western's presentation. Just as the Board was not limited to the scope of the relief requested in the applications, the Commission here should not be restricted to the specific relief requested in the complaints; in each case the standard under which "the public interest is given a paramount consideration is a correct standard" (328 U.S. at 580), and in neither case was a fair hearing denied.[9]

4. The Court below imposed upon the Commission a stricter notice standard than applies in civil actions in district courts. Rule 54(c) of the Federal Rules of Civil Procedure require that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

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[9] Moreover, having actual notice of the scope of the proceeding, appellees were not prejudiced by the absence of other, formal notice; and the court below erred in failing to take proper account of the rule of prejudicial error. See Administrative Procedure Act, Sec. 10(e), 60 Stat. 243, 5 U.S.C. 1009(e).

Under the latter rule, "the nature of the order to be entered is to be determined by what the facts establish, not what the lawyer prays for." *South Fall Corporation* v. *Rochelle*, 329 F.2d 611, 619 (5th Cir. 1964).[10] In contrast the Court below would without precedent read Section 16(6) of the Interstate Commerce Act, 49 U.S.C. 16(6), and Section 4 of the Administrative Procedure Act, 60 Stat. 238, 5 U.S.C. 1003, as limiting an administrative agency to the specific pleadings of the complainant or the bounds of foresight established in a predecisional notice of the agency.

CONCLUSION

The district court's order sweeps aside five years of administrative proceedings with the bare holding that the Commission should have foreseen from the start the result it would reach in ordering an adjustment in the vastly complicated field of grain rates. The court relies upon no policy justification for its novel notice requirement, which it imposes in a manner more demanding of the agency than the federal rules of civil procedure are of courts in civil actions. The court relies upon no real prejudice to the appellee railroads, which from the date of the original hearings were made aware that at least one party, and others

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[10] See also *Mass. Bonding & Ins. Co.* v. *State of New York*, 259 F.2d 33, 40 (2d Cir. 1958); *Schoonover* v. *Schoonover*, 172 F.2d 526, 530 (10th Cir. 1949); *Cohen* v. *Randall*, 137 F.2d 441, 443 (2d Cir. 1943), cert. denied 320 U.S. 796; *Kansas City, St. Louis & C.R.Co.* v. *Alton R. Co.*, 124 F. 2d 780, 783 (7th Cir. 1941).

inferentially, sought vacation of the mandatory rate break rule. The district court has so restricted the Commission's choice of relief in rate cases of the present type so as to seriously impair its decisional function. This appeal presents substantial questions in the administration of the Interstate Commerce Act and probable jurisdiction should be noted.

Respectfully submitted,

ROBERT W. GINNANE,
General Counsel,

LEONARD S. GOODMAN,
Assistant General Counsel,

Interstate Commerce Commission.

November 1965.

APPENDIX

UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

64 C 2014

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

MEMORANDUM OPINION

Before CASTLE, Circuit Judge, and PERRY and AUSTIN, District Judges.

PERRY, District Judge. Plaintiff railroads in this action under Sections 1336, 1398, 2284 and 2321 through 2325, inclusive, of Title 28, United States Code, seek to suspend, enjoin, annul and set aside the Interstate Commerce Commission's order of June 5, 1964, entered in proceedings designated before the Commission as Docket No. 17000, Rate Structure Investigation, Part VII, Grain and Grain Products Within the Western District and For Export, in so far as that order modifies previous orders in said proceeding dated October 22, 1934 and March 4, 1936. (Reference hereinafter made to "plaintiffs" will include those who have intervened as plaintiffs in this action.)

This cause came on for hearing before a duly designated three-judge statutory court which finds that it

has jurisdiction of the subject matter hereof and of the parties hereto.

It appears that in 1959 and 1960 five separate complaints, presenting similar issues, were filed with the Interstate Commerce Commission and consolidated for hearing and disposition, and that after proceedings had, the Commission on June 5, 1964, filed its Report and entered its order.

On page 755 of its Report, the Commission said:

> "As indicated in appendix A, the complainants allege that the rate-break combinations applicable on certain grain shipments transited at the considered primary markets are unjust and unreasonable, unduly discriminatory, and subject the complainants to undue prejudice and disadvantage to the undue preference and advantage of other interior transit points and operators who are permitted to transit similar shipments at lower rates.
>
> "It should be stressed that the level of the considered rates is not in issue. Moreover, the complainants concede that on the great majority of the considered traffic, which flows from west to east, the normal drawing areas for each of the primary markets are territories from which there are no through rates by way of these markets less than the rate-break combinations, and therefore present no problem to the primary market. *However, it is contended that on a small but important segment of the traffic* the rates applicable on shipments transited at the primary markets subject those markets and the transit operators located thereat to an unreasonable handicap in competing with interior markets and transit operators. It is only in instances

> where a one-factor through rate from origin to transit destination, lower than the rate-break combination applicable on shipments transited at a particular primary market, applies through that primary market on shipments transited at interior points, that the rate-break combinations are alleged to be unlawful. Complainants seek transit on these lower rates through the primary markets. * * * *" (Emphasis supplied) *

The Commission's order of June 5, 1964, here under attack, dismissed the complaints but it did not stop there. Although the considered rates applied only to limited and specified areas, and although the Commission's Report recognized that complainants' contentions related to a "small but important segment of the traffic," the Commission further ordered—

> "That the proceeding in Docket No. 17000, Rate Structure Investigation, Part VII, *Grain and Grain Products Within the Western District and for Export*, 205 I.C.C. 301 and 215 I.C.C. 83, be, and it is hereby, reopened for reconsideration, and that the orders entered therein, on October 22, 1934, and March 4, 1936, respectively, be, and they are hereby, modified so as to be vacated and set aside to the extent that they require observance of rate-break combinations and of proportional rates therein prescribed as the exclusive basis of charges on shipments of grain and grain products at points from which proportional rates are applicable."

thus abolishing the absolute "rate break" rule not only as to the limited area covered by the five com-

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* See *Board of Trade* v. *United States*, 314 U.S. 534, for meaning of terms used in Commission's Report and order.

plaints but also throughout the entire Western district.

It appears that at no time did the Commission give any notice that it contemplated reopening Docket 17000, Part VII, nor did it give any notice in Docket 17000, Part VII of the proposed modification of the orders of October 22, 1934 and March 4, 1936 to make observance of the "rate-break" rule voluntary or permissive instead of mandatory throughout the entire Western district.

Plaintiffs base this suit on the failure of the Commission to comply (a) with Section 16(6) of the Interstate Commerce Act (49 U.S.C. § 16(6) and (b) with Section 4 of the Administrative Procedure Act (5 U.S.C. § 1003) which prescribes rulemaking procedures.

Plaintiffs do not gainsay the authority of the Commission to act or rule in the premises but contend that such action and ruling should have been preceded by notice in order to afford plaintiffs an opportunity to be heard and to present data on the question of the vacation of the absolute "ratebreak" rule throughout the entire Western district. They contend that their arguments made and data presented before the Commission were confined to the places and traffic involved in the proceedings on the five complaints.

It is interesting to observe that the recommended Report and order prepared and filed by the Examiner, who held lengthy hearings in the matter of the five complaints, contains the following paragraph relating to the issues:

> "All of the complaints challenge the legality of charges on grain and grain products caused by the absolute rate-break rule with respect to certain of its applications at Minneapolis, Minn.,

> and the lower Missouri River markets of Kansas City, Omaha and St. Joseph, Mo., and Kansas City, Atchison and Leavenworth, Kans. While one of the complaints attacks the lawfulness of the rule *per se*, the evidence is confined to specific rate situations. Only the lawfulness of these is considered herein. Relief is sought only as to existing rates and existing routes,"

to which limitation of the issues no exception was taken.

It appears that at one point during the proceedings before the Commission on the five complaints, the Secretary of Agriculture of the United States, an intervenor, requested that Docket 17000, Part VII, be included in the proceedings but the request was denied by the Commission.

Re: Notice required by Section 16(6) of Interstate Commerce Act

At page 775 of its Report the Commission said that its action in vacating the mandatory aspect of the rule was done pursuant to its authority under Section 16(6) of the Interstate Commerce Act. That section provides that "The commission shall be authorized to suspend or modify its orders upon *such notice* and in such manner as it shall deem proper." (emphasis supplied). Clearly the giving of some form of notice is contemplated by the statute.

Re: Notice required by Section 4 of the Administrative Procedure Act.

In Docket 17000, Part VII, the Commission prescribed a mandatory rule known as the "ratebreak system" which was in effect throughout the entire Western district. " 'Rulemaking' means agency process for the formulation, amendment, or repeal of a

rule" (5 U.S.C. § 1001(c)) and the Commission's action in modifying the orders in Docket 17000, Part VII, and making permissive or voluntary that which had theretofore been mandatory, constituted "rule-making."

Section 4(a) of the Administrative Procedure Act provides that

> "General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings . . . ."

The order of June 5, 1964 does not come within any of the exclusionary provisions of Section 4 which excuse compliance with notice requirements.

Defendants contend that plaintiffs had sufficient actual notice. However, notice cannot be ascribed to these plaintiffs because they were present and participated in the five-complaint proceedings before the Commission. Parties to proceedings cannot be expect to grope through the litigation. These plaintiffs were entitled to clear, decisive notice of the Commission's contemplated enlargement of the issues in the proceeding and of the proposed amendatory action in Docket 17000, Part VII. We agree with Vice Chairman Webb who stated in his dissent that "No segment of the grain trade and no carrier had any reason to suppose that any such drastic action was within the scope of this proceeding."

For reasons herein stated, the Court finds that the order of the Interstate Commerce Commission dated June 5, 1964, in the Commission's Docket 17000, Part VII, *Grain and Grain Products within the Western*

District and for Export, to the extent that said order modifies prior orders in said Docket entered October 22, 1934 and March 4, 1936, is void and concludes that said order to the extent herein above specified must be vacated and set aside and its enforcement permanently enjoined, all without prejudice to further proceedings before or by the Interstate Commerce Commission not inconsistent with this opinion.

In arriving at our conclusions herein this court is not considering or passing on the question of whether orders of the Interstate Commerce Commission respecting freight rates applicable to grain or grain products, freight rates applicable or the rules governing such rates should be modified or changed in an appropriate proceeding by the Interstate Commerce Commission.

This memorandum opinion shall constitute the court's findings of fact and conclusions of law.

Judgment in accordance with opinion.

Dated: Chicago, Illinois, May 24, 1965.

/s/ Latham Castle
United States Circuit Judge

/s/ Sam Joseph Perry
United States District Judge

/s/ Richard B. Austin
United States District Judge

UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

No. 64 C 2014

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

JUDGMENT ORDER

This cause having come on to be heard before a statutory three-judge court, and briefs having been submitted, the cause having been argued by counsel, and the court having on this date filed its memorandum opinion,

It is ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission dated June 5, 1964, in the Commission's Docket 17000, Part VII, *Grain and Grain Products within the Western District and for Export*, to the extent that said order modifies prior orders in said Docket entered October 22, 1934 and March 4, 1936, be and it is hereby vacated and set aside, and its enforcement permanently enjoined, all without prejudice to further proceedings before or by the Interstate Commerce Commission, not inconsistent with this court's aforesaid memorandum opinion filed herein.

ENTER:

/s/ Latham Castle
United States Circuit Judge

/s/ Sam Joseph Perry
United States District Judge

/s/ Richard B. Austin
United States District Judge

Dated: Chicago, Illinois, May 24, 1965.

STATUTES INVOLVED

Section 15(1) of the Interstate Commerce Act, 49 U.S.C. 15(1), provides:

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or

will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15(2) of the Interstate Commerce Act, 49 U.S.C. 15(2) provides:

> Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Section 16(6) of the Interstate Commerce Act, 49 U.S.C. 16(6) provides:

> The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Section 4(a) of the Administrative Procedure Act, 5 U.S.C. 1003, provides:

> * * * General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and

nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e) provides:

> * * * So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise re-

viewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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